

Tentative Rulings for August 17, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG03118	<i>Piedra v. Reyes</i> (Dept. 502)
15CECG00261	<i>Boparai v. Nieto</i> (Dept. 402)
15CECG00974	<i>Barboza v. Stengel</i> (Dept. 501)
15CECG03951	<i>Green v. California Dept. of Corrections & Rehabilitation</i> (Dept. 403)
11CECG04395	<i>Switzer v. Flournoy Management, LLC, et al</i> (Dept. 501)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

07CECG01723	<i>In re: 6029 N. Malsbary Avenue, Fresno, California</i> (Dept. 501) [Hearing on petition for order from court deposit of surplus funds from trustee's sale continued to August 24, 2016, at 3:30 p.m. in Dept. 501]
07CECG04166	<i>Gomez v. Gomez, et al.</i> – all motions are continued to Tuesday, September 13, 2016, at 3:30 p.m. in Dept. 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20)

Tentative Ruling

Re: ***Gutierrez v. Patterson***, Superior Court Case No. 15CECG02845

Hearing Date: **August 17, 2016 (Dept. 402)**

Motion: Plaintiff's Motion to Set Aside Dismissal

Tentative Ruling:

To grant and set aside the dismissal entered June 6, 2016. (Code Civ. Proc. § 473(b).)

Explanation:

This action was dismissed without prejudice after plaintiff's counsel failed to appear at a dismissal hearing after settlement on June 6, 2016. Counsel failed to appear due to a calendaring error resulting from high staff turnover. Relief is warranted under Code Civil Procedure § 473(b) due to the mistake, inadvertence or excusable neglect of counsel. "Where an attorney states that he was unaware of his duty to appear or answer because his employees misplaced papers or misinformed him as to the relevant date, relief is routinely granted." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/16/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Ali v. Commercial Trade, Inc.***
Case No. 16 CECG 01996

Hearing Date: August 17, 2016 **(Dept. 402)**

Motion: Quash Service of Summons

Tentative Ruling:

To grant the motion pursuant to CCP § 418(a)(1). The Clerk's Office is direct to strike the proof of service filed on June 27, 2016.

Explanation:

On June 22, 2016, Plaintiff, who is self-represented filed a complaint alleging inter alia a violation of the Fair Credit Reporting Act. On July 21, 2016, Defendant filed a motion seeking to quash service of summons. No opposition has been filed.

Without valid service of summons, the court never acquires jurisdiction over defendant. Hence, the statutory ground for the motion to quash is that the court *lacks jurisdiction* over the defendant. [CCP § 418.10(a)(1)] A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons. [*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466; *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808]

Here, the proof of service of summons was filed on June 27, 2016. It indicates that Hal Bradford Ennis, agent for service of process was personally served on June 22, 2016 in Bakersfield, CA. However, the Declaration of Ennis filed in support of the motion states that he was not personally served. See Declaration at ¶¶ 2-4. In addition, the Declaration of Estella Perez is submitted in support of the motion. She states that she is the collector for the Plaintiff's case. She states that she was served on June 22, 2016 with the complaint, summons etc. But, she is not authorized to accept service on behalf of the Defendant corporation. See Declaration of Perez at ¶¶ 1-4.

The Defendant has met its burden of proof. Plaintiff has filed no opposition and thus, has failed to show that service was proper. The motion will be granted pursuant to CCP § 418.10(a)(1).

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/16/16.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: **California Consulting, LLC v. Townsend Public Affairs, Inc., et al.**
Superior Court Case No. 15CECG03267

Hearing Date: **August 17, 2016 (Dept. 402)**

Motions: Defendant Gary Rogers' Motion for Separate Trial

Tentative Ruling:

To deny.

Explanation:

The court may, "sever an action where the interests of justice require." (CCP § 1048(b); *City of Sacramento v. Superior Court In and For Sacramento County* (1962) 205 Cal.App.2d 398, 403.) However, separate trials are generally improper where a single judgment would resolve the issues raised in the parties' pleadings. (*Carpenson v. Najarian* (1967) 254 Cal.App.2d 856, 862.)

Here, the complaint includes the moving defendant in all but one cause of action and the allegations of unlawful solicitation essentially underlie the entire complaint. Similarly, although the present motion seeks to bifurcate the rescission cause of action, it nevertheless acknowledges that a pertinent factual issue in that analysis is whether the defendant "unlawfully solicited clients/prospective clients" of the plaintiff. (see P&As in support of motion, pg. 6:2-5.) Considering the basis for the rescission claim is identical to the basis supporting remaining causes of action, the ends of interests of justice would not be promoted by trying the matters separately.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/16/16.
 (Judge's initials) (Date)

Tentative Rulings for Department 403

(24)

Tentative Ruling

Re: ***De Los Santos v. Sihota***
Court Case No. 14CECG03301

Hearing Date: **August 17, 2016 (Dept. 403)**

Motion: Defendant's Motion for Order Deeming Requests to Admit Truth of Facts Against Plaintiff

Tentative Ruling:

To grant. The matters specified in defendant's Requests for Admission (Set Two) are deemed admitted, unless plaintiff Juan Ramos De Los Santos serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure Section 2033.220.

Explanation:

Failure to timely respond to Requests for Admission results in a waiver of all objections to the requests. (Code Civ. Proc. Section 2033.280, Subd. (a).) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) "The law governing the consequences for failing to respond to requests for admission may be the most unforgiving in civil procedure. There is no relief under section 473. The defaulting party is limited to the remedies available in [Code of Civil Procedure Section 2033.280]...." (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 394–395, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

But the court may relieve the party who fails to file a timely response if, before entry of the order deeming the requested matters admitted, the party in default 1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect;" and 2) serves a response in "substantial compliance" with Code of Civil Procedure Section 2033.220 (See Code Civ. Proc. Section 2033.280(a)-(c); See *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.) "If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion . . . Everything, in short, depends on submitting responses prior to the hearing." (*Demyer v. Costa Mesa Mobile Homes Estates* (1995) 36 Cal. App. 4th 393, 395-396.)

Since plaintiff did not comply with responding to the Requests for Admission, and there is no evidence that he has either requested relief from his failure to respond or submitted proper responses before the hearing, this motion will be granted.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 08/16/16.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Kenco Investments, Inc. v. Martha Marsh***
Superior Court Case No. 15CECG02521

Hearing Date: Wednesday, August 17, 2016 (**Dept. 403**)

Motions: (1) Defendant Martha Marsh's Motion for Leave to File Cross-Complaint
(2) Plaintiff Kenco Investments, Inc.'s Motion to Stay Proceedings

Tentative Ruling:

To grant Defendant Martha Marsh's motion for leave to file cross-complaint. (Code Civ. Proc., §§ 428.10, subd (a) & 428.50, subd. (c).) Defendant Martha Marsh shall file and serve her cross-complaint within 10 calendar days after service of the minute order.

To deny Plaintiff Kenco Investments, Inc.'s motion to stay proceedings.

Explanation:

Defendant's Motion for Leave to File Cross-Complaint

Defendant Martha Marsh, as Trustee of the Joseph Haig Boyd Living Trust dated May 30, 1991 ("Defendant"), moves this Court for an order permitting her to file a cross-complaint for partition against Plaintiff Kenco Investments, Inc. ("Plaintiff"). Since Defendant has already filed her answer to Plaintiff's complaint, Defendant cannot file her proposed cross-complaint without leave of court. (Code Civ. Proc., § 428.50, subds. (a) & (c).)

Code of Civil Procedure section 428.10, subdivision (a) provides, in relevant part, that: "A party against whom a cause of action has been asserted in a complaint ... may file a cross-complaint setting forth...: (a) Any cause of action he has against any of the parties who filed the complaint ... against him." Further, Code of Civil Procedure section 428.50, subdivision (c) states that: "Leave may be granted in the interest of justice at any time during the course of the action."

In this case, Plaintiff argues that, by seeking to file a cross-complaint for partition, Defendant might breach her fiduciary duty to all of the beneficiaries of the J.H. Boyd Trust and that Defendant has an inherent conflict of interest in seeking to partition the Boyd Professional Center. However, since Plaintiff is not a beneficiary of the J.H. Boyd Trust, Plaintiff does not have standing to raise any claims that Defendant has an inherent conflict of interest and may breach her fiduciary duty by filing a cross-complaint for partition. (See *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 462-463.)

Plaintiff's Motion to Stay Proceedings

However, initially, as discussed above, Plaintiff does not have standing to raise any claims that Defendant might violate her fiduciary duties to the beneficiaries of the J.H. Boyd Trust or that the partition cross-complaint creates a conflict of interest for Plaintiff because Plaintiff is not a beneficiary of the J.H. Boyd Trust. Further, since Case No. 15CECG00915 is currently set to go to trial in November 2016, approximately 3 months before the instant action is currently set to go to trial, it appears at this time that Case No. 15CECG00915 will be resolved before Defendant's cross-complaint for partition will be resolved. Hence, the Court finds that Plaintiff has failed to establish that it is necessary to stay the instant action pending the resolution of Case No. 15CECG00915 at this time.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: KCK on 08/16/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(5)

Tentative Ruling

Re: **Gallegos v. Community Foundation Medical Group dba
Community Medical Providers**
Case No. 15CECG 03633
Hearing Date: August 17, 2016 (**Dept. 501**)
Motion: Relief from Waiver of Jury Trial

Tentative Ruling:

To grant the motion pursuant to CCP § 631(g).

Explanation:

On November 25, 2015, the Plaintiff filed a complaint alleging a cause of action for medical malpractice. On March 18, 2016, the Defendant was served via substitution. An Answer was filed on April 26, 2016. Defendant did not know that a CMC had already taken place on March 28, 2016. No one appeared and the CMC was continued to May 31, 2016. However, Defendant did not receive notice of the continuance because it had not appeared. See Declaration of Wainwright at ¶¶ 4-7.

At the CMC, Plaintiff's counsel appeared and apparently waived her right to a jury trial. Defendant was deemed to have waived its right due to nonappearance. Id. at ¶ 9. When Defendant's counsel became aware of the waiver, he began to "meet and confer" with Plaintiff's counsel. Id. at ¶¶ 10-15. A motion seeking relief was filed on July 6, 2016. Plaintiff filed notice of non-opposition on July 15, 2016.

Even when a party has waived the right to jury trial, the court may, in its discretion, allow trial by jury upon such terms as may be just. [CCP § 631(g)] The grounds upon which relief will be granted are committed to the sound discretion of the trial court. But the right to a jury trial is constitutional in nature, and therefore any doubt must be resolved in favor of *upholding* the right. [*Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 823]

In the motion at bar, the motion was filed promptly. The motion is unopposed. Under the circumstances presented, the motion will be granted pursuant to CCP § 631(g).

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 08/15/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20)

Tentative Ruling

Re: ***Brough-Stevenson, M.D. v. Community Emergency Medical Assoc., et al.***, Superior Court Case No. 11CECG01089

Hearing Date: **August 17, 2016 (Dept. 502)**

Motion: Plaintiff's Motion for Judgment on the Pleadings

Tentative Ruling:

To deny. (Code Civ. Proc. § 438(c).)

Explanation:

Plaintiff moves for judgment on the pleadings on the ground that the 3rd, 5th, 9th-13th, 15th-19th and 22nd affirmative defenses are barred by principles of collateral estoppel.

As plaintiff points out, the long-established rule in California is: "In ruling on a plaintiff's motion for a judgment on the pleadings, the trial court must consider (1) whether or not the complaint states a cause of action and, if it does, (2) whether or not the answer states facts sufficient to constitute a defense. If the answer does not, a judgment on the pleadings for plaintiff is proper." (*MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 812-813.)

Here, plaintiff fails to address the issue of whether the complaint states a cause of action. This alone requires denial of the motion.

In addition, collateral estoppel simply does not apply. Plaintiff takes the position that the Court of Appeal adjudicated defendants' 3rd affirmative defense (Civil Code § 47 privilege) in plaintiff's favor.

The elements of collateral estoppel clearly are not met.

Under the doctrine of collateral estoppel, prior decision precludes relitigation of an issue only if five threshold requirements are satisfied: 'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.]

(*Hardy v. America's Best* (2014) 232 Cal.App.4th 795, 803.)

Collateral estoppel requires, among other things, that the issue decided be the same. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832,843.)

The collateral estoppel argument fails first because there has been no final decision on the merits of any of defendants' affirmative defenses. The only issue reached by the Court of Appeal was whether the allegedly defamatory statements concerned an issue of widespread public interest sufficient to come within the purview of Code of Civil Procedure section 425.16. The appellate court's decision had no bearing on the merits of defendants' privilege defense. The decision made no mention of any privilege, of Civil Code section 47, or of any affirmative defense.

At the end of her memorandum, plaintiff asserts that the 9th affirmative defense (Not Strangers to the Contract) is vague, unclear and uncertain.

This mere conclusory assertion, with no analysis and discussion, is insufficient. Each motion must be supported by a memorandum, and the memorandum must contain "a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (Cal. Rules of Court, Rules 3.1112(a), 3.1113(a).) Plaintiff's memorandum is lacking in any discussion or analysis.

Additionally, "[a] motion for judgment on the pleadings performs the same function as a general demurrer . . ." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) The claimed uncertainty would be a ground for special demurrer. As such, it is untimely, because an objection that a pleading is uncertain or subject to special demurrer are waived if not asserted in timely demurrer. (*Ramey v. Myers* (1952) 111 Cal.App.2d 679, 684.) "Challenges to a pleading on ground of uncertainty or ambiguity must be timely raised in the trial court by demurrer or answer. Otherwise, the objection is deemed waived. It cannot be raised for the first time on appeal." (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2016) ¶ 7:89.1, citing Code Civ. Proc. § 430.80(a); *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on 8/15/16.**
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Rustigan v. Meckenstock***
Court Case No. 15CECG02937

Hearing Date: **August 17, 2016 (Dept. 502)**

Motion: Default Prove-Up Hearing

Tentative Ruling:

To deny without prejudice.

Explanation:

No Request for Default as to all persons claiming any right or title through defendants Daniel and/or Cathy Pereyra has been filed, nor default entered. No "Request for Court Judgment" (using the same form, CIV-100, but filled out to request judgment rather than default) has been filed as to any defendant, which also means that plaintiff has not clarified if it is seeking attorney fees and/or punitive damages under the Elder Abuse cause of action, or reimbursement of costs, and if so in what amount.

If punitive damages are sought, there has been no evidence filed showing that the required Statement of Damages pursuant to Code of Civil Procedure section 425.115 has been served on defendants or, in the case of the defendants served by publication, that this Statement was published. Filing the Request for Court Judgment would also aid in determining quickly if punitive damages are not being sought due to the default context.

Finally, plaintiff has not filed a prove-up brief to summarize the evidence to be submitted and the relief to be requested, and any legal analysis needed. (Cal. Rules of Court, Rule 3.1800, subd. (a)(1).) In this case, plaintiff has alleged four different causes of action (not counting the one directed against dismissed defendant Jennifer Guevara), some of which would require facts to be proved up that others would not. It is not in the interests of judicial economy for the court to analyze causes of action that will not even be utilized to obtain a default judgment. The prove-up brief therefore provides the critical focus for the court's attention. Pursuant to Fresno County Superior Court Local Rule 2.1.14, all paperwork in conjunction with the default prove-up hearing must be filed at least ten court days prior to the scheduled hearing date.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 8/15/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Sona Joan Chitjian v. Starling Bone, Placer Title Company and Mother Lode Holding Company***
Superior Court Case No. 15 CECG 03008

Hearing Date: August 17, 2016 **(Dept. 502)**

Motion: By Plaintiff to set aside entry of default against Defendant Bone

Tentative Ruling:

To deny the motion on the grounds that the statute permits relief only from default taken against a party. See CCP § 473(b).

Explanation:

Plaintiff holds a promissory note in the amount of \$83,736.48 secured by real property located at 212 North H Street, Fresno, CA. On or about March of 2014, the owner of the property, Starling Bone entered into a purchase agreement to sell the property. The escrow company chosen by Bone was Placer Title. Plaintiff alleges that an escrow officer at Placer Title informed her that she needed to execute a substitution of trustee, a Deed of reconveyance and a beneficiary demand in order to permit the sale to go through and for Plaintiff to receive the amount owing on the Note from the proceeds. Plaintiff alleges that after she signed the documents, that escrow was cancelled. Defendant Bone then sold the property through a second escrow without notifying the Plaintiff.

On September 24, 2015, Plaintiff filed a Complaint against the Defendants alleging causes of action for common counts; breach of contract; breach of fiduciary duty; professional negligence; negligence; concealment; unjust enrichment; and declaratory relief. After Plaintiff was unable to effectuate personal service of the summons, complaint, etc. through due diligence, she filed for an order seeking permission to serve via publication in the Mountain Press. The order was signed on October 24, 2015.

On February 11, 2016, Plaintiff filed proof of publication. On April 21, 2016, default was entered against Defendant Bone. On July 13, 2016, Plaintiff dismissed Placer Title and Mother Lode Holding Company without prejudice.

On July 26, 2016, Plaintiff filed a motion seeking to set aside the default on the grounds that the entry was premature. Defendant Bone's workplace has since been located and Plaintiff wishes to serve discovery. See Declaration of Amy Lovegren-Tipton at ¶¶ 11-14.

CCP § 473(b) states in pertinent part:

The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding **taken against him or her** through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

In the case at bench, the entry of default was taken against Defendant Bone, not the Plaintiff. Therefore, the motion must be denied. Parenthetically, the court notes that the fact that defendant's default has been entered does not prevent plaintiff from taking his deposition or subpoenaing records from him.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 8/15/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503